

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
2018 Quadrennial Regulatory Review -)	MB Docket No. 18-349
Review of the Commission's Broadcast)	
Ownership Rules and Other Rules Adopted)	
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	

In the Matter of)	
)	
Promoting Innovation and Competition in the)	MB Docket No. 14-261
Provision of Multichannel Video Programming)	
Distribution Services)	

**REPLY COMMENTS OF THE
ABC TELEVISION AFFILIATES ASSOCIATION
AND THE NBC TELEVISION AFFILIATES**

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Introduction

The ABC Television Affiliates Association and the NBC Television Affiliates (collectively, the “Affiliates Associations”)¹ reply to comments submitted in response to the Commission’s *Notice of Proposed Rulemaking* (“*Notice*”) in the above-referenced docket, in which the Commission seeks comment on the retention, modification, or elimination of core media ownership rules in light of the current marketplace for the distribution of video programming.²

The Affiliates Associations file these reply comments to address two issues raised in this docket that are essential to the Commission’s analysis of its current media ownership rules: (1) the continued importance of the Dual Network Rule to maintaining the balance and positive dynamic tension between networks and affiliates and (2) the importance of classifying online video distribution platforms (“OVDs,” sometimes referred to as “OTT providers” or “vMVPDs”) as multichannel video programming distributors (“MVPDs”) in order to accurately reflect today’s video distribution ecosystem. Both issues bear directly and significantly on the core localism principle that animates the Commission’s regulatory system designed to ensure that the American people receive access to both national and local programming.

¹ The ABC Television Affiliates Association and the NBC Television Affiliates are non-profit trade associations whose members consist of local television broadcast stations throughout the country that are each affiliated with its respective broadcast television network.

² See *2018 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 18-349, Notice of Proposed Rulemaking, FCC 18-179 (released Dec. 13, 2018) (“*Notice*”). These reply comments are also being filed in another docket, *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261.

I. The Dual Network Rule Must Be Preserved

In this proceeding, the Commission has invited comment on the continued efficacy of the Dual Network Rule, which prohibits common ownership of two or more of the Big Four networks,³ in light of “the current state of the media marketplace.”⁴ As they have done in prior Quadrennial Review proceedings, the Affiliates Associations join other commenters in urging the Commission to preserve the status quo by retaining the Rule in its current form.⁵

In the Commission’s 2010 Quadrennial Review proceeding, the Affiliates Associations

³ The Dual Network Rule provides:

A television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were “networks” as defined in § 73.3613(a)(1) of the Commission’s regulations (that is, ABC, CBS, Fox, and NBC).

47 C.F.R. § 73.658(g). The rule “effectively prohibits a merger between or among the Big Four broadcast networks (ABC, CBS, Fox, and NBC).” *Notice*, ¶ 77.

⁴ *Notice*, ¶ 77 (asking commenters to address whether the Dual Network Rule remains “necessary in the public interest as a result of competition or whether it should be modified or repealed”). *See also id.* ¶¶ 1, 6. The Notice similarly invites comment on the retention, modification, or repeal of two other media ownership rules: the local television ownership rule and the local radio ownership rule. The Affiliates Associations’ reply comments are limited to the Dual Network Rule.

⁵ The Affiliates Associations agree with those commenters who acknowledge the continued importance of the Dual Network Rule to core communications policies. *See, e.g.*, Comments of Writers Guild of America, West, Inc., MB Docket No. 18-349 (Apr. 29, 2019) at 9 (arguing that repeal of the rule “would unquestionably lead to increased concentration in the national television marketplace, decreased diversity of content and creativity, and harm to local news”); Comments of Ride Television Network, MAVTV Motorsports Network, Cinemai and Bein Sports, MB Docket No. 18-349 (Apr. 29, 2019) at 10 (arguing that “elimination of the rule will undermine the[e] careful balance” of power between the Big Four networks and their local affiliates, “resulting in more broadcaster consolidation and amplifying the harms to competition, localism, and viewpoint diversity”); Comments of Free Press, MB Docket No. 18-349 (Apr. 29, 2019) at 6 (“The Big Four networks continue to provide a distinct and valuable product, the utility of which would be greatly reduced for consumers were the networks allowed to eat their closest competition.”).

described the Dual Network Rule as “continu[ing] to serve as an important reinforcing mechanism for maintaining a proper balance in the network-affiliate relationship that so effectively serves the American public.”⁶ Comments filed by the NBC Television Affiliates in the 2014 Quadrennial Review were to similar effect: They argued that “[a]llowing any of the major networks to merge would increase their leverage over affiliates to the detriment of localism” and that “relaxation of the Dual Network Rule would increase the networks’ leverage over affiliates and decrease the affiliates’ ability to ensure that network programming is appropriate for and responsive to the needs of their respective local communities.”⁷

Nothing has changed with respect to the fundamental relationship between network and affiliate: The Dual Network Rule continues to serve those purposes recited by affiliates in prior proceedings and long recognized by the Commission. As the Commission has acknowledged,

[t]he network-affiliate model balances competing interests: networks have an economic incentive to ensure that programming appeals to a mass, nationwide audience and is widely shown by affiliates [A]ffiliates, in contrast, have an economic incentive to gain viewers and attract advertising dollars by tailoring programing to their

⁶ Joint Comments of ABC Television Affiliates Association, CBS Television Network Affiliates Association, and NBC Television Affiliates (Mar. 5, 2012) at 1-2, *2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 and Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket Nos. 09-182 & 07-924.

⁷ Comments of the NBC Television Affiliates (Aug. 6, 2014) at 2-3, *2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50. The CBS Television Network Affiliates Association similarly urged the Commission to retain the Dual Network Rule on the ground that “[a]llowing any of the big four networks to combine would exacerbate the power the networks already have over their affiliates to the detriment of localism.” Comments of the CBS Television Network Affiliates Association (Aug. 6, 2014) at 2, *2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50.

local audiences. . . . [A]ffiliates therefore have an incentive to influence network programming choices to ensure that the programming serves local needs and interests.⁸

The Dual Network Rule remains indispensable to striking that balance. In fact, if anything, the Dual Network Rule is more important than ever, in today's media marketplace, to ensuring an appropriate balance of power between national broadcast networks and their local affiliates. Escalating consolidation among the national media companies calls for more, not less, Commission attention to ensuring a proper balance between local broadcast stations and the national television networks.

Just one example of the dangers of national network consolidation makes the point. Any increase in the concentration of economic power at the network level would create a corresponding chilling effect on the independent exercise by local affiliates of their public interest and legal responsibility to broadcast programs that they deem to be of most significant value and interest to their local communities.⁹ Some national networks have, in the past, threatened to terminate or not renew a local station's network affiliation when a local affiliate preempts national network programs in favor of local programs of greater local interest.¹⁰ If the number of Big Four network owners were to decrease, local affiliates who exercise their preemption rights, thereby ensuring the primacy of locally-focused programming, would have even fewer program options and fewer alternative choices of network program providers. A

⁸ Notice, ¶ 85 (citations omitted).

⁹ See Notice, ¶ 88 (explaining that "the Dual Network Rule is intended to preserve the ability of local affiliates to advocate for local interests in programming decisions").

¹⁰ See "Program Exclusivity, Congress, and the FCC: A History of the 'Mosaic' of Statutes and Regulations That Govern the Distribution of Television Programming," Comments of the

terminated affiliate, for example, would no longer be able to turn to three other networks for a new affiliation and the desirable programming it brings; rather, there would be, at most, two network affiliation options. As that example illustrates, relaxation of the Dual Network Rule would place local affiliates—and, thus, the locally-focused programming that they alone provide in the local video ecosystem—at even greater disadvantage.

From its inception, the Dual Network Rule was intended to promote viewpoint diversity and foster competition among national program providers and to protect local affiliate stations from an imbalance of power favoring the national network companies.¹¹ Given the growth of media concentration at the national level and the corresponding growth in market power that networks possess—and often assert—over their affiliates, the Dual Network Rule continues to play a valuable role in promoting the Commission’s core policies, including, most importantly, localism. While national programming services proliferate, local affiliates continue to be the *sole* generators of the locally-focused news, weather, sports and emergency information programming that epitomizes the core localism value.

Modification or elimination of the Dual Network Rule would increase the leverage of the Big Four networks over their local affiliates, hampering local affiliates’ ability to influence programming decisions in a way that best serves the needs and interests of their local communities, all to the substantial detriment of localism interests. Because the Dual Network Rule continues to serve the significant public interest in today’s increasingly competitive media marketplace, it should be retained.

National Association of Broadcasters, *Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket No. 10-71 (June 26, 2014), Appendix A.

¹¹ See Notice, ¶¶ 80, 85.

II.

The Commission Should Modernize the Interpretation of “MVPD” to Include Online Video Programming Distributors

In its Quadrennial Review proceeding, the Commission undertakes to evaluate the continued importance and efficacy of the three specified ownership rules in light of changes in the video programming marketplace.¹² The *Notice* acknowledges one particularly significant marketplace development:

One of the biggest changes in the video programming market has been online distribution of programming from a variety of sources. Today, OVDs—including linear multichannel streaming services, both those from social media companies and other online platforms, and direct-to-consumer offerings by broadcast networks themselves—reach millions of consumers.¹³

The Affiliates Associations wholeheartedly agree—and, for that reason, again urge the Commission both to classify online video distributors (also known as OVDs, “over-the-top” providers, OTT services, and vMVPDs) as MVPDs, both for purposes of the statutory retransmission consent regime¹⁴ and in order to fully and accurately evaluate the importance and efficacy of the ownership rules under review in this proceeding.

The issue is one on which the Affiliates Associations have long sought Commission action. In 2015, they (along with the CBS Television Network Affiliates Association and the FBC

¹² See, e.g., *Notice*, ¶ 43 (asking “whether the current version of the Local Television Ownership Rule is necessary in the public interest as a result of competition”); *id.* ¶ 77 (asking whether the Dual Network Rule “remains necessary to promote our goals of competition, viewpoint diversity, and localism”).

¹³ *Notice*, ¶ 83. See also *id.* ¶ 2 & nn.7 & 8 (observing that “U.S. adults now watch more than one hour of online video per day” and that “61 percent of those between ages 18 and 29 say an online streaming service is the primary way they watch television”).

Television Affiliates Association) filed comments urging the Commission to act on its proposal to “modernize” the interpretation of the open-ended, technology-neutral statutory term “multichannel video programming distributor” to include services that distribute video programming—particularly broadcast station signals—via the Internet.¹⁵ As noted in those comments, Commission treatment of OVDs as MVPDs would be both legally symmetrical and practically sound; it would also be straightforward, technology neutral, simple in application, and consistent with the flexible and open-ended statutory and regulatory definitions of “MVPD” that already exist, neither of which is tethered to any particular methodology or technology—Internet or otherwise—used to distribute linear broadcast programming. As the Affiliates Associations observed some four years ago, “[a]t bottom, video programming distributors that use the Internet are similar to traditional MVPDs in the most important way: They deliver linear streams of video programming to subscribers.”¹⁶

The Affiliates Associations fully incorporate those prior comments by reference in this docket and renew their arguments for treating Internet-based programming distribution services as MVPDs. The Affiliates Associations noted then, and reiterate now, that a broad, inclusive definition of “MVPD” has significant implications for local broadcasters—and for the broadcast ownership rules and policies at issue in this proceeding—because, among other things, including OVDs within the definition of MVPD would subject them to the retransmission consent regime.¹⁷

¹⁴ See 47 U.S.C. § 325(b)(1)(A); see also 47 U.S.C. § 522(13); 47 C.F.R. §§ 76.1000(e), 76.1300(d) (defining “MVPD”).

¹⁵ See Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates, *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261 (Mar. 3, 2015) (“Affiliates’ OVD Comments”).

¹⁶ Affiliates’ OVD Comments at iv; see also *id.* at 13.

Allowing OVDs to remain outside the retransmission consent regime, by contrast, threatens to devalue the local component of the broadcast television ecosystem on these increasingly important platforms.

As the *Notice* acknowledges, “[t]he rise of online video options in recent years . . . may have altered the network-affiliate dynamic”:

OVDs now reach millions of consumers, creating new opportunities for networks to achieve widespread distribution without the direct involvement of network affiliates. In the broadcast-MVPD world of retransmission consent, local affiliates may have some recourse against broadcast networks bypassing their affiliates in this manner by negotiating for, and if necessary enforcing via Commission rules, contractual network non-duplication rights, which protect a broadcast station’s right to be the exclusive distributor of network programming within a specified geographic zone. By contrast, in the world of online video distribution, local affiliates lack a comparable regulatory backstop. The ability of networks to achieve online distribution of network programming in a local market, without the need for local affiliates to consent, may give networks some additional leverage in the network-affiliate relationship that did not exist in the pre-online video world.¹⁸

The Affiliates Associations believe that “regulatory backstop” should apply in the OTT ecosystem in the same way.

In the absence of a rule that defines OVDs to be MVPDs subject to the retransmission consent regime, the national television networks, rather than local broadcasters, have taken the lead role in negotiations for distribution of broadcast television programming in the emerging OTT space. The retransmission consent regime allows local broadcast stations to negotiate the terms and

¹⁷ The legislative history of the 1992 Cable Act makes clear that “*anyone engaged in retransmission by whatever means*” must obtain the consent of the station whose signal is retransmitted. See S. REP. NO. 92-102, 1992 U.S.C.C.A.N. 1133, 1167 (1991) (emphasis added).

¹⁸ *Notice*, ¶ 87.

conditions for distribution of their signals and the valuable local news, public affairs, weather, emergency, and other programming they contain. By contrast in the OTT realm, the networks effectively act as the gatekeepers of access to broadcast programming, including local news and public affairs programming, by Internet-based distributors.¹⁹ As long as OVDs remain outside the definition of MVPD and therefore outside the retransmission consent regime, that paradigm won't change.

What's more, the threat to local stations' ability to control the retransmission of their signals is not limited to new-entrant OVD services. As recent market developments make clear, the definitional loophole that allows OVDs to avoid the retransmission consent regime invites traditional MVPDs, such as DIRECTV and DISH Network, to migrate their services to the Internet (in the form of OTT services like DIRECTV Now and Sling TV), to the significant detriment of local broadcast stations that rely on retransmission consent revenues to support the creation of high-quality, locally oriented news, weather, sports and public affairs programming that form the core of the Commission's localism mandate.²⁰

At bottom, broadcast-streaming²¹ online video distribution platforms provide the same

¹⁹ For the last several years, the Big Four broadcast networks have negotiated "opt-in" agreements with OTT services (including DIRECTV Now, DISH Sling, YouTube TV, Hulu + Live TV, and FuboTV) that are presented to their respective affiliates (and, in some cases, affiliates are given limited opportunity to negotiate "direct" agreements with OTT providers, subject to required terms specified by the networks). That process largely if not entirely removes local affiliates from the negotiation of the terms and conditions upon which their broadcast signals (including the local content they contain) are distributed by Internet-based platforms. Under that paradigm, the continued growth of OVD platforms will only increase the national networks' leverage, as they will control negotiations with an ever-larger OTT subscriber base.

²⁰ See Affiliates' OVD Comments at 18-19.

²¹ As the Affiliates Associations observed in 2015, OVDs that distribute more than one linear stream of broadcast station programming to subscribers at prescheduled times should be considered

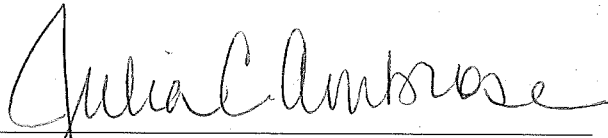
functional distribution service as traditional MVPDs, varying only in the distribution method used. OVDs should be treated no differently than MVPDs for purposes of the retransmission consent rules. All entities that distribute linear streams of video programming to subscribers should be considered MVPDs, regardless of whether distribution is accomplished by means of cable, satellite, microwave, or via the Internet. A core commitment to ensuring a healthy local programming ecosystem requires no less.

Conclusion

For the foregoing reasons, the Affiliates Associations respectfully urge the Commission (1) to retain the Dual Network Rule given its centrality to core communications policy goals of competition, diversity, and localism and (2) to clarify that online video distributors fall within the definition of “multichannel video programming distributor” contained in Sections 76.1000(e) and 76.1300 of the Commission’s rules.

MVPDs; transaction-based or subscription-based video-on-demand services are distinguishable (although *no* third party may carry any broadcast station’s signal without its consent). *See* Affiliates’ OVD Comments at iv, 13-15.

Respectfully Submitted,

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